Supreme Court, U.S.
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No. 00-594

IN THE

Supreme Court of the United States

JOSEPH J. WAYMIRE,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether compliance with railway safety regulations adopted by the Secretary of Transportation pursuant to the Federal Railway Safety Act ("FRSA"), 49 U.S.C. § 20106, protects a railroad from a claim of negligence arising under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, when the claim is based on the same subject matter covered by the regulations.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

All of the parties to the proceeding below are named in the caption. Respondent Norfolk and Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

This is a strikingly unusual case in which a railroad employee has sued his employer under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, for injuries allegedly suffered in a rail-highway grade crossing accident on the theory that the railroad was negligent despite its compliance with federal regulations. Most such cases are brought by an individual in the vehicle that is struck by the train, who sues under state tort law. See Pet. App. 4a ("The vast majority of courts examining lawsuits arising out of automobile/train collisions do so under state law."). Petitioner has identified only three reported cases other than the decision below involving this situation in the 30 years since the Federal Railroad Safety Act ("FRSA") was enacted, all from the district courts.[1] Indeed, petitioner recognizes that the issue

[1] *See* Pet. 12 (citing *Rice* v. *Cincinnati, New Orleans & Pac. Ry.*, 955 F. Supp. 739 (E.D. Ky. 1997); *Thirkill* v. *J.B. Hunt Transp., Inc.*, 950 F. Supp. 1105 (N.D. Ala. 1996); *Earwood* v. *Norfolk S. Ry.*, 845 F. Supp. 880 (N.D. Ga. 1993)).

was one of "first impression" at the court of appeals level when it was decided by the Seventh Circuit in this case. Pet. 11; see also *id.* at 12 ("This is the first decision issued by a Court of Appeals wherein the FRSA precludes a plaintiff's FELA claim."). Given the absence of any conflict in the Circuits and the infrequency with which the issue arises, this case is manifestly unworthy of this Court's review.

1. On June 8, 1996, petitioner was a conductor of a train on a railroad operated by respondent. The train collided with a truck at a grade crossing in Muncie, Indiana. Fortunately, no one was seriously injured physically by the accident, but petitioner claimed that he developed post-traumatic stress syndrome. Accordingly, he filed suit against respondent under FELA in the United States District Court for the Northern District of Indiana, alleging that respondent's negligence caused the petitioner's injuries. Specifically, petitioner argued that the train operated at an excessive speed by traveling at 25 miles per hour approaching an allegedly hazardous grade crossing and that the railroad negligently failed to provide additional warning protections at the grade crossing to prevent vehicles from getting trapped on the tracks.

Respondent filed for summary judgment, claiming that neither common law theory was viable in light of regulations adopted by the Secretary pursuant to FRSA. Respondent argued that speed regulations adopted by the Secretary covered the railroad's responsibiiities regarding train speeds, and thus no claim of negligence was available if the railroad complied with the Secretary's speed regulation. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 674-75 (1993). Similarly, the railroad contended that the crossing protections had been installed using federal funds and that the Secretary of Transportation (and not respondent) was therefore responsible for the level of protection provided at that crossing. See *id.* at 670-71; *Norfolk S. Ry.* v. *Shanklin*, 120 S. Ct. 1467, 1474-76 (2000).

2. The district court granted the motion and dismissed petitioner's suit. The district court relied upon the policy embodied in FRSA (49 U.S.C. § 20106) "'to ensure uniformity in law pertaining to railway safety.'" Pet. App. 14a (quoting *Rice*, 955 F. Supp. at 740). The court reasoned that once the Secretary had promulgated a regulation designed to promote safety in a particular rail operation, that regulation covered the subject matter and any claims of negligence based on a different legal standard would necessarily create disuniformity. *Id.* at 16a. Given the comprehensive delegation of authority under FRSA to the Secretary to regulate all facets of rail safety, the district court concluded that "the FRSA evinces a congressional intent and statutory purpose, manifested through the regulations, to supplant federal common law on train speed and warning devices." *Id.* at 21a.

The court of appeals affirmed. Like the district court, the court of appeals viewed the issue as "whether a railroad company can be liable in a FELA negligence action claiming unsafe speed and inadequate warning devices when the complained of conduct complies with the conduct mandated by FRSA and its regulations," Pet. App. 3a. The court held that FRSA's command of uniformity in railway safety law trumps petitioner's FELA claims. *Id.* at 7a. Accordingly, the court concluded that "because [respondent] complied with FRSA and its regulations," there was no basis for imposing liability under FELA. *Id.* at 7a-8a.

REASONS FOR DENYING THE PETITION

Petitioner demonstrates why the case does not warrant review by this Court. He correctly observes that the decision below stands alone at the court of appeals level in addressing the issue presented and that there are only three reported district court opinions on the subject. This situation plainly does not deserve this Court's attention. See Sup. Ct. R. 10. Moreover, the decision below is fully consistent with this

Court's decisions concerning the relationship between the federal common law and congressional enactments, and is a proper reconciliation of FELA and FRSA. In sum, the Court should deny the petition.

1. Petitioner's first argument (Pet. 8-11) is that the Secretary's safety regulations cannot affect petitioner's FELA claim because the Secretary only has authority under FRSA to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970," 49 U.S.C. § 20103. According to petitioner, a railroad safety regulation does not supplement FELA if it precludes liability in certain circumstances.

Petitioner's reliance on this point is odd since it was not even addressed below. Moreover, the argument is entirely misplaced; the limitation on the Secretary's authority in section 20103 has nothing to do with FELA.[2] But even if it

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[2] The House Report accompanying FRSA expressly stated that the limitation in section 20103 was solely "to make clear that this grant of jurisdiction d[id] not replace the existing rail safety statutes and implementing regulations *transferred to the Department of Transportation when it was established*." H.R. Rep. No. 91-1194, at 16 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4113-14 (emphasis added). In other words, Congress clarified that the Secretary did not have carte blanche to regulate railroad safety without regard to the limitations and directives of existing statutes, and their implementation in existing regulations, which had worked well in the specific areas covered. *Id.* The railroad safety statutes to which Congress referred in section 20103 were such provisions as the "Safety Appliance Acts, Signal Inspection Act, Ash Pan Act, Locomotive Inspection Act, Accident Reports Act, and the Hours of Service Act." *Id.* at 8, *reprinted in* 1970 U.S.C.C.A.N. at 4105. FELA was not a railroad safety statute administered by the Secretary, and was thus not included in Appendix B to the House Report, which set forth the "complete text of existing railroad safety laws" addressed in section 20103. *Id.* at 16, *reprinted at* 1970 U.S.C.C.A.N. at 4114; *see id.* at 40-65 (App. B), *reprinted in* 1-4 *House Miscellaneous Reports on Public Bills, IV* (1970). Thus, nothing in section 20103 limits the authority of the Secretary to issue safety rules with regard to matters that may be the subject of a suit under FELA.

were otherwise, the regulation does no more than supplement FELA in any relevant sense.

Under FELA, liability was and is predicated on the railroad's "negligence." 45 U.S.C. § 51. "As a general negligence statute, FELA neither prohibits nor requires specific conduct by a railroad." Pet. App. 3a. Obviously, negligence is not a self-defining concept. Instead, it requires a determination, *inter alia*, of what is the railroad's duty of care. What the FRSA regulations do is no more than give content to that duty. The decision below holds that, once the Secretary has defined the railroad's duty of care by regulation, a jury may not impose a conflicting duty of care upon the railroad. Thus, there is no real tension between the regulations and FELA; they operate in complete harmony, with the federal regulation supplementing FELA by defining the duty of care. The decision reconciles FELA and FRSA by eliminating the absurdity that a plaintiff may ask a jury to find conduct to be negligent which the Secretary (and this Court) have already found "is not culpable negligence." *Id.* at 5a.

Petitioner contends (Pet. 9-10) that this case presents issues under *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), and *United States* v. *Texas*, 507 U.S. 529 (1993), as to when statutes displace pre-existing federal common law rules. Even if that were true, it would not justify review by this court. The question under *City of Milwaukee* is "whether the scheme established by Congress addresses the problem formerly governed by federal common law." 451 U.S. at 315 n.10. As the district court held, FRSA and the regulations issued thereunder "evince[] a congressional intent and statutory purpose . . . to supplant federal common law on train speed and warning devices." Pet. App. 21a. There is no displacement of FELA generally; rather the Secretary's regulations simply supply in specific circumstances a definition of the duty of care that otherwise would be determined retrospectively by a lay jury on the facts of a

particular case. Not only is the decision below clearly correct, but at most this petition merely contests a specific application of the settled rule of law of *City of Milwaukee*. Such a claim of error is inherently unworthy of review by this Court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

2. Petitioner's second argument (Pet. 11-13) concerning the proper interpretation of FRSA's preemption provision similarly provides no basis for this Court to grant certiorari. To be sure, the specific preemption provisions in FRSA are by their terms limited to supplanting state law, and the court of appeals did not suggest otherwise. Pet. App. 4a. It merely found the statute, and this Court's interpretation of it in *Easterwood*, to be "instructive" in determining "the interaction of two federal statutes." *Id.* at 4a.

FRSA states an affirmative command of uniformity of railroad safety laws: "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Although the specific FRSA preemption provisions in furtherance of that policy do not deal directly with federal common law, there is no reason why a court should not take that declared national policy into account in reconciling an asserted conflict between two federal statutory schemes. A jury's determination of a duty of care under FELA that conflicts with a duty of care established by federal regulation destroys the national uniformity of railroad safety laws, no less than does a jury determination under state tort law.[3] Thus, imposing liability under federal law for conduct that complies with safety

[3] Petitioner invokes *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969), but *Crane* simply holds that in passing *FELA*, Congress contemplated different treatment of railroad employees and state tort-law plaintiffs. Decided before FRSA was even enacted, *Crane* has no bearing on the vindication of FRSA's policy of national uniformity in railroad safety laws.

regulations directly interferes with FRSA's overriding objectives.[4]

3. Petitioner is also correct (Pet. 16-18) that plaintiffs bringing negligence claims under FELA do not confront the same defenses to a cause of action that many or even most plaintiffs face when they sue under state common law. But that does not convert FELA into a no-fault workers compensation statute. It remains necessary for petitioner to prove negligence, which requires a breach of a duty of care. FRSA's regulations define the relevant duty—train speed limits and appropriate grade crossing protections—and petitioner conceded below (Pet. App. 22a, 23a) that the railroad did not violate those requirements. Again, by allowing FRSA to define the standard of care, the Seventh Circuit in fact harmonized the two statutory schemes.[5]

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[4] Petitioner's reliance (Pet. 13-14) on Section 5 of FELA, 45 U.S.C. § 55, is plainly misplaced. That provision does not apply to the Secretary's regulation. It refers to actions by the railroad that "exempt *itself* from any liability." *Id.* (emphasis added). Such actions include an exemption in the railroad's "regulations," a term often used in statutes of FELA's vintage to refer to a common carrier's own rules. *Cf., e.g.*, 47 U.S.C. § 201(b) (Communications Act of 1934) (requiring common carrier to adopt just and reasonable "charges, practices, classifications, and regulations"). Here, the *Secretary* provides the relevant standard absolving the railroad of liability if the railroad complies with that safety standard. Moreover, FRSA does not "exempt" the railroad from liability. It merely establishes the relevant standard of care. Failure to comply with that standard exposes the railroad to liability.

[5] Although the lower courts generally spoke accurately of petitioner's specific *claims* under FELA as being "superseded by FRSA and its regulations," (Pet. App. 7a; *see also id.* at 5a, 16a, 22a, 23a-24a),.they also sometimes more loosely characterized their holdings in terms of FRSA's policy of uniformity "supersed[ing]" FELA itself (*id.* at 7a, 23a). Those latter characterizations are not, however, necessary to the courts' holdings. It is more apt (as the court of appeals also did (*id.* at 3a)) to describe FRSA's more specific standards as providing the relevant basis for determining liability under FELA. Nevertheless, even if the issue were

4. Finally, petitioner complains (Pet. 18-20) that the FRSA standards really will not protect worker safety because the purpose of the speed limit regulation is to protect against train derailments and not to prevent collisions with other vehicles. But this is precisely the same argument this Court rejected in *Easterwood*, 507 U.S. at 675. Similarly, his argument that the warning-device regulations were intended to establish "a minimum kind of grade crossing protection," (Pet. 19) and not to relieve the railroad of the duty to establish the proper level of protection for a particular crossing, was directly rejected in *Shanklin*, 120 S. Ct. at 1475-76. Moreover, neither of these arguments provides any reason for this Court's review on certiorari. At most they are issues the Secretary should consider. See *id.* at 1477 (Breyer, J., concurring).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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posed as whether FRSA superseded FELA, the holdings were clearly correct that FRSA's objectives should trump FELA's, given Congress' dominant purpose embodied in FRSA to ensure uniform safety standards.